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92-933

NO. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

AMERICO LOPES, TRUSTEE OF THE
841 LAKE REALTY TRUST

Petitioner

v.

CITY OF PEABODY,

Respondent

Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a landowner have to be justly compensated under the Constitution's Fifth Amendment, when a regulation validly enacted pursuant to the State's Zoning Enabling Act which condemns the use of the private property by leaving it valueless and without any beneficial use?

2. Does a subsequent landowner have a claim for deprivation of the use of his property by the enactment of a valid regulation which rendered the property valueless, and when neither the prior owner nor the present landowner were justly compensated by the governmental agency which enacted the regulation causing the condemnation?

LIST OF PARTIES

The parties to the proceedings below were:

1. The Petitioner, Americo Lopes, Trustee of the 841 Lake Realty Trust.

2. The Respondent, the City of Peabody, a municipal corporation, organized under the laws of the Commonwealth of Massachusetts.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Opinions Below	2
Jurisdiction	3
Constitutional Provisions Involved. .	4
Statutes Involved	4
Statement of the Case	5
Reasons for Granting the Writ	9
1. The Supreme Judicial Court of Massachusetts, in affirming the Appeals Court, has improperly approved a land taking without just compensation	9
2. A subsequent landowner has a claim for inverse condemnation of his property and the right to be compensated, when the enactment of a valid regulation renders the property valueless, provided that the prior owner was not compensated by the governmental agency enacting the regulation	12

Conclusion. 17

Appendix

TABLE OF AUTHORITIES

Cases

Commissioner of Natural Resources v. S. Volpe & Co., Inc., 349 Mass. 104 (1965) 10

Lucas v. South Carolina, 112 S.Ct. 2886 (1992) 11

MacGibbon v. Board of Appeal of Duxbury, 369 Mass. 512, 517 (1976) 9

Nollan v. California Coastal Commission, 483 U.S. 285, 834 (1987) 11,15

Palmer v. Palmer, 27 Mass.App.Ct. 141, 147 (1989) . . 14

Pennsylvania Coal Co.v. Mahon, 260 U.S. 393 (1922) 9,14,16

Other Authorities

U.S.C. §§ 1257 4

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CITY OF PEABODY,

Respondent

Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Americo Lopes as he is Trustee of the 841 Lake Realty Trust respectfully prays that a writ of certiorari

issue to review the memorandum and order of the Appeals Court of the Commonwealth of Massachusetts entered July 7, 1992, and the September 3, 1992, denial of his application for further appellate review by the Supreme Judicial Court of the Commonwealth of Massachusetts.

OPINIONS BELOW

On September 3, 1992, the Supreme Judicial Court denied an application for further appellate review of the memorandum and order of the Appeals Court of the Commonwealth of Massachusetts, affirming the judgment of the Land Court of the Commonwealth of Massachusetts for the County of Essex,

Honorable Marilyn M. Sullivan, dated January 29, 1991, which is unreported but is set forth in the appendix, at App. 9, 22 & 24.

The Massachusetts Appeals Court's memorandum and order affirming the trial court is unreported but is set forth in the appendix, at App. 27.

The Supreme Judicial Court's order denying review is unreported but is set forth in the appendix, at App. 40.

JURISDICTION

The jurisdiction of this Court to review the September 3, 1992 Order of the Supreme Judicial Court of the Commonwealth of Massachusetts denying the Petitioner's Petition for Further Appellate Review is invoked under 28 U.S.C. § 1257, which provides as follows:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. . . . "

CONSTITUTIONAL PROVISION, STATUES AND ZONING ORDINANCE INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

The Fourteenth Amendment provides in pertinent part "nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

The General Laws of Massachusetts, Chapter 185, Section 1 (j 1/2) and Chapter 240, Section 14A, and the Zoning Ordinance of the City of Peabody, Section 4.3.4 are set forth in the appendix (App. 41).

STATEMENT OF THE CASE

In August, 1981, the Petitioner purchased four separate, distinct and non-contiguous lots of land without any buildings located thereon, and one of those lots is the subject matter of this Petition. The lot contains approximately 11,820 square feet and was laid out as a lot by a plan dated April 1874. It has remained in the same configuration since that time.

The Petitioner's land is isolated and no additional land can be purchased by the landowner to enlarge the lot to comply with

the elevation requirements of the zoning regulation. It is bounded on two sides by Devil's Dishful Pond which is owned by the Respondent, on the third side by Lake Street which is also owned by the Respondent and on the fourth side by a railroad right of way which is owned by the Transit Authority, a state agency. The lot conforms to all of the other requirements of the zoning ordinance.

The City of Peabody, in 1975, amended its Zoning Ordinance and enacted a flood boundary district and wetlands conservancy district and as a result thereof prohibited the use of the Petitioner's land for any beneficial use. Because the level of the Petitioner's land is below the level of the conservancy district elevation, he is prohibited from building a single residential dwelling on his lot as allowed by the zoning ordinance. The following uses were permitted by the

amendment of the Zoning Ordinance: For conservation of water, plants and wildlife; recreation, including play areas, wild life preserves, golf, boating, fishing and hunting; grazing, farming, forestry and nurseries; the proper operation of water control structures; and any building located thereon may be repaired.

The Petitioner filed a Petition for Declaratory Judgment with the Land Court for the County of Essex, seeking to declare the zoning ordinance invalid, claiming that he was being deprived of his property without due process of law and contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States. (App. 5, Paragraph 11; App. 22).

It was stipulated by the parties that the Petitioner is unable to use his land as a result of the revision of the Zoning Ordinance (App. 26).

The Respondent has valued the Petitioner's land at $95,000.00 for real estate tax purposes.

The Land Court, Sullivan, Marilyn M. presiding, found that there has been no taking of the Petitioner's land for which he is entitled to compensation and entered a judgment accordingly (App. 23).

The deprivation of the loss of the Petitioner's property without just compensation was also asserted at the Appeals Court (App. 35) and the Supreme Judicial Court of Massachusetts (App. 40).

REASONS FOR GRANTING THE WRIT

I

The Supreme Judicial Court of Massachusetts, in affirming the Appeals Court, has improperly approved a land taking without just compensation.

The Supreme Judicial Court of Massachusetts has neglected to recognize not only the law as stated in its own jurisdiction, but, more importantly, has discarded and is obfuscating the law as has been consistently enunciated for more than 70 years by this Court. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the progenitor of regulatory takings without just compensation jurisprudence and for two Massachusetts cases, see MacGibbon v. Board of Appeal of Duxbury, 369 Mass. 512, 517 (1976), where the practical use of land of

MacGibbon was reduced to the same non-beneficial use as was the land of the Petitioner, Lopes. If the denial of the special permit was sustained, MacGibbon would have been allowed to use his 11 acre parcel only for bird watching, hiking, looking at the water, just simple pride of ownership, just to say that they own a piece of salt marsh, flying model airplanes and kites, growing marsh hay, to protect the view and to provide a view. The Supreme Judicial Court ordered the zoning board of appeals to issue the special permit. In the case of Commissioner of Natural Resources v. S. Volpe & Co., Inc., 349 Mass. 104, (1965), it was ruled by the Court that notwithstanding the meritorious character of the regulation, if there is a deprivation of the practical use of the landowner's property, it would be equivalent to a taking without compensation.

More recently, in the cases of Nollan v. California Coastal Commission, 483 U.S. 285, 834 (1987),

> "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land."

and Lucas v South Carolina 112 S.Ct. 2886 (1992) reaffirmed at page 2893,

> "the oft-cited maxim that, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" . . . In 70 odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engage in . . . essentially ad hoc, factual inquiries.'"

The Petitioner and the Respondent stipulated at the trial before the Land Court, in no uncertain terms, that the Petitioner "is unable to use his land as a result of the revision of the Zoning Ordinance." (App. 26). The decision of the

Land Court resorts and relies on the observation that it is a mixed question of law and fact to be decided by the Court. In its decision of January 29, 1991; however, there are no findings of fact as to what use the petitioner can make or not make of his land, despite the stipulation of the parties that the Petitioner is unable to use his land, except a finding that Lopes is substantially restricted in the use of his land. (App. 23).

The regulation has deprived Lopes of any reasonable use of his lot and has rendered it valueless, and it denies Lopes the economical viability of his land.

II

A subsequent landowner has a claim for inverse condemnation of his property, when the enactment of a valid regulation renders

the property valueless, provided that the prior owner was not compensated by the governmental agency enacting the regulation.

The order of the Appeals Court fails to recognize Lopes's loss of any beneficial use of his land, even though it acknowledged that he has no practical or beneficial use of his land.

The Appeals Court sustains the enactment of the regulation as not being arbitrary and then states that it is a trend in the Commonwealth of Massachusetts to uphold reasonable restraints on the use of land for environmental purposes, which the Petitioner concedes is the law. (App. 36).

The Appeals Court acknowledged that Massachusetts and Federal laws are substantially similar as they relate to just compensation.

The Appeals Court justifies the affirmation of the Land Court judgment by citing the dissent of Justice Brandeis in Pennsylvania Coal Co. v. Mahon, supra, at 416, and relies in particular on a sentence which states,

> "Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put."

as if it was the law for the last 70 years.

Needless to say the Appeals Court has either failed to read the opinion of the Court delivered by Justice Holmes or is misguided when it relies on the dissenting opinion as if it was the law.

It would have been more appropriate if the Appeals Court had followed its own admonition as found in the case of Palmer v. Palmer, 27 Mass.App.Ct. 141, 147 (1989) as it relates to the use of dissenting opinions.

> "As befits an intermediate appellate court, in the condition of the law described above, we pass by the remarks of the dissenting Justice in Gottsegen and assume that the Bell case, as decided by the Supreme Judicial Court , remains our rule of decision."

The Appeals Court stated in its order that a subsequent purchaser having knowledge of the regulation cannot make a claim for inverse condemnation, despite the ruling of this Court in Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

The Appeals Court evades the principle of law which requires the governmental agency, when it enacts a valid regulation, to also

compensate the landowner when, as a result of the enactment, the landowner loses the beneficial use of his property.

The house lot owned by Lopes is strikingly similar to the private house owned by Mahon in the case of Pennsylvania Coal Co. v. Mahon, supra. As stated by Justice Holmes at page 413,

> "No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the Commonwealth."

Lopes, just because he owns a single house lot, should not be deprived of his property in complete contradiction to the United States Constitution, nor should he be deprived of his property because it is trendy or fashionable to sustain regulations which would deprive him of his property rights.

CONCLUSION

For all of the reasons presented herein, this Petition for Writ of Certiorari should be granted.

The decisions of the Land Court, the Appeals Court, and the Supreme Judicial Court of the Commonwealth of Massachusetts sustaining the regulation, but not complying with the just compensation clause of the United States Constitution, do not coincide with the Fifth and Fourteenth Amendments of the United States Constitution and are in direct conflict with the decisions of this Court.

Respectfully submitted:

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APPENDIX

Table of Contents

	Page
Land Court Petition	1
Land Court Decision	9
Land Court Judgment	22
Land Court Order	24
Appeals Court Memorandum	27
Appeals Court Judgment	39
Supreme Judicial Court Denial of F.A.R. Application	40
General Laws of Massachusetts, Chapter 185, Section 1	41
General Laws of Massachusetts, Chapter 240, Section 14A	41

App. 1

COMMONWEALTH OF MASSACHUSETTS

LAND COURT
CASE NO. 139663

AMERICO LOPES AS HE IS TRUSTEE OF
THE 841 LAKE REALTY TRUST, Plaintiff

v. **PETITION**

CITY OF PEABODY, Defendant

The Plaintiff invokes the provisions of General Laws Chapter 185, Section 1 (j 1/2) and Chapter 240, Section 14A.

1. The Plaintiff is Americo Lopes as he is Trustee of the 841 Lake Realty Trust under a Declaration of Trust dated August 20, 1981, and recorded at the Essex South District Registry of Deeds, Book 6853, Page 622, and resides at 34 Walsh Avenue, Peabody, Essex County.

2. The Defendant is the City of Peabody, a municipal corporation duly organized and existing under the laws of the Commonwealth

of Massachusetts conducting its business at City Hall, 24 Lowell Street, Peabody, Essex County.

3. The Plaintiff is the owner of a parcel of property located in said Peabody, which parcel is more particularly described in a deed from Stephen Ferrari to the Plaintiff recorded at said Deeds, Book 6853, Page 633, and is the third parcel described in that deed and contains, according to said deed, 27/100 acres.

4. The City of Peabody, as allowed by Chapter 40A, enacted a Zoning Ordinance in 1978 which is entitled "The Zoning Ordinance of the City of Peabody, Massachusetts."

5. The property that is owned by the Plaintiff is located on Lake Street in Peabody, Massachusetts, and portions of the

property abut a pond commonly known as Devil's Dishful Pond, and is located in a zoning district entitled "Residence R-1".

6. The Zoning Ordinance of the City of Peabody has included therein a wetlands conservation district and pursuant to Section 4.3.4, by the enactment of that section, the Zoning Ordinance has placed a burden upon the property that is owned by the Plaintiff by not allowing any use of land which has an elevation less than 88.5 feet that is located in the location of Devil's Dishful Pond.

7. By the enactment of that provision, the Plaintiff cannot use his property for single residential use because the Plaintiff's land has an elevation that ranges from 86 feet to 89 feet.

8. On April 25, 1986, the Plaintiff duly applied for an amendment to the Zoning Ordinance as it relates to his property to

lower the present elevation from 88.5 feet to 86 feet, and the City Council denied the application and refused to amend the Zoning Ordinance.

9. The land owned by the Plaintiff is suitable for a single residential dwelling, excepting for the elevation requirement as heretofore stated. The Plaintiff intends, if allowed by the Court, to erect a single residential dwelling on said land which would have a floor elevation of no less than 89.50 feet and that floor elevation would be higher than the elevation of Lake Street which abuts Devil's Dishful Pond which has an elevation of 88 feet.

10. A single residential dwelling placed on the Plaintiff's land would not increase by any measurable amount the rate of run-off of Devil's Dishful Pond, and therefore by

allowing the erection of the single residential dwelling would not be contrary to the purposes of the Zoning Ordinance, and will not cause any seasonal, periodic, or continuing flooding of the property downstream as is stated in the Zoning Ordinance.

11. The provisions of the Zoning Ordinance of the City of Peabody as specifically applied to the Plaintiff's property have no reasonable relation to the public health, safety, and welfare, are arbitrary, discriminatory and unreasonable, and deprive the Plaintiff of his property without due process of law contrary to the Fifth and Fourteen Amendments to the Constitution of the United States.

12. For reasons set forth above, an actual controversy exists between the Plaintiff and the Defendant regarding their respective

rights and duties under the provisions of the Zoning Ordinance of the City of Peabody as applied to Plaintiff's above described property in the City of Peabody.

13. Unless granted the relief herein, Plaintiff will suffer irreparable injury in that his land is rendered useless, for the prevention of which he has no adequate legal remedy.

WHEREFORE, the Plaintiff requests that the Court:

1. Enter a Judgment declaring the provision of the Zoning Ordinance of the City of Peabody, Section 4.3.4, as it pertains to the Plaintiff's above-described property, to be invalid and declaring that the Plaintiff has a clear legal right to use the property for single residential purposes as allowed by other provisions of the Zoning Ordinance.

2. Enjoin the Defendant and all persons acting under it and their successors and assigns from in any way interfering with the obtainment of a permit to construct a single residential dwelling thereon, provided that the Plaintiff complies with the valid ordinances of the City of Peabody pertaining thereto.

3. Grant to the Plaintiff such further relief as this Court deems just and proper.

Verification

The undersigned, Americo Lopes, Trustee of the 841 Lake Realty Trust, Plaintiff in the above-captioned proceeding, certifies under the penalties of perjury that he has read the foregoing Petition and knows the contents thereof, and the contents are true of such party's knowledge, except as to matters stated on information and belief, and as to

those matters he believes them to be true.

s/Americo Lopes Trustee
841 Lake Realty Trust

s/Nicholas J. Decoulos
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December 6, 1989

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

Essex, ss.

Miscellaneous
Case No. 139663

AMERICO LOPES, AS HE IS TRUSTEE OF THE 841 LAKE REALTY TRUST,
Plaintiff

v.

DECISION

CITY OF PEABODY,
Defendant

This is a complaint pursuant to the provisions of G. L. c. 185, §1(j1/2) and c. 240, §14A for a determination of the validity of the provisions of Section 4.3.4 of the Peabody Zoning Ordinance as applied to a parcel of land on Lake Street in Peabody in the County of Essex owned by the plaintiff, Americo Lopes, Trustee of the 841 Lake Realty Trust under a Declaration of Trust dated

August 20, 1981, and recorded with Essex South District Deeds, Book 6853, Page 622. The City of Peabody is the defendant.

A trial was held at the Land Court on September 13, 1990, at which a stenographer was appointed to record and transcribe the testimony. The plaintiff, Alan F. Taubert, former City Engineer and Director of Public Services for the defendant and presently Superintendent of Public Works and Town Engineer for the Town of Swampscott,[1] Ralph Gondolfo, Peabody Building Inspector and Dennis DiZoglio, Community Development Director for the City of Peabody testified at the trial. All exhibits introduced into evidence are incorporated herein for the purpose of any appeal. The sole question

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1. Between these two positions the witness served as City Engineer and Superintendent of Public Works for the City of Beverly.

presented for decision is whether the provisions of the Zoning Ordinance which defines the boundaries of the wetlands conservancy district as all lands below the elevations shown on the applicable table, 88.5 feet for Devil's Dishful Pond as well as any area within thirty feet thereof, measured horizontally are arbitrary and unreasonable and if not, whether the ordinance constitutes a taking of the plaintiffs' land.

On all the evidence I find and rule as follows:

1. The plaintiff is the owner of a parcel of land (the "locus") containing 11,820 square feet on said Lake Street conveyed to him by Stephen Ferrari by deed dated August 19, 1981 and recorded with said Deeds, Book 6853, Page 633 (Exhibit No. 3A).

2. At the time of the plaintiff's purchase the Peabody Zoning Ordinance imposed the

constraints set forth above which were adopted in 1975 and which the City Council refused to amend in 1980 other than to make changes to accommodate FEMA.

3. The methodology employed in 1975 to set minimum permissible elevations was called the rational approach based on the one hundred year storm. An effort then was made to determine the magnitude of the storm at certain control points where there was a physical constraint on the passage of water such as a road. The capacity of the culvert below the road was measured, none of which was sufficient to pass the estimated water of a one hundred year storm. Since the road then was like a dam, obstacles to the passage on top of the road were checked to see how high water would have to reach to pass the road. At Devil's Dishful this resulted inthe 88.5 foot figure.

4. This pond is a part of a watershed that begins at Suntaug Lake, extends from Lynnfield, drains into Winona Pond and then into Devil's Dishful from which it flows in a river to the Ipswich River.

5. The pipe in the culvert beneath the road from which measurements were made, Lake Street appears to have been enlarged since 1975 and flashboards installed. The significant change in determining the proper elevation, however, is a change in methodology mandated by the Department of Environmental Protection, Dk 55 or Dk 20.

6. The plaintiff's expert testified that based on the more modern technique and the review of work by Boston Survey Consultants the maximum anticipated flood elevation was 86.6 feet.

7. The BSC report (Exhibit No. 15) was available at the meeting of the City Council,

but the Planning Department in reliance on the City's expert Fay, Spofford & Thorndike, Inc. opposed the reduction. The BSC figures were for an August storm whereas Fay, Spofford & Thorndike, Inc. (Exhibit No. 6) recommended a consideration of figures in the season when the ground was less permeable.

8. The nature of a one hundred year storm is such that generally occurs in the fall.

9. The difference in the minimum required elevation is determinative of the plaintiff's ability to build a residence on the locus. A proposed plot plan (Exhibit No. 4) entitled "Site Plan of Land in Peabody, Mass. for Charles Goutzis", dated December 19, 1981 by T & M Engineering Associates illustrates the topographical features of the locus. While the site plan does not show the thirty foot setback from the pond, the layout of any proposed house could be revised to meet this

requirement. The lot also conflicts with the minimum area requirements of the ordinance, but it may a protected non-conforming parcel, a question I do not reach here.

10.The Peabody Zoning Ordinance sets forth in section 4.3.1 the purposes for the creation of flood boundary district and wetlands conservancy district as follows: (Exhibit No. 1):

a. To provide that the lands subject to seasonal or periodic flooding, as described in this ordinance, shall not be used for residence or for other purposes when such use will endanger the health or safety of the occupants thereof or of the public generally;

b. To minimize future flood damage by providing for protection and retention of existing water courses, water bodies and wetlands;

c. To protect, preserve and maintain the water table and water recharge areas so as to preserve present and potential water supplies for the public health and safety; and

d. To protect the community from unreasonable danger of pollution to its waterways by the detrimental use and development of lands adjoining these waterways. (Ord. of 10-23-80, §1)

11.The wetlands conservancy district is addressed in section 4.3.4 as follows:

a. The wetlands conservancy district is hereby established as an overlay district, which is separate from the flood boundary district. For the purpose of the ordinance, the wetlands conservancy district shall be defined as including all lands generally shown on the accompanying zoning maps as referred to in section 3.2. The wetlands conservancy district includes all lands generally shown on the accompanying #g zoning maps, as referred to in section 3.2 more particularly, the "City of Peabody, Mass. Wetlands Conservancy Map, 1" = 800'". These lands, adjacent to the city's important waterways, namely Ipswich River, Norris Brook, Proctor's Brook, Goldthwaite Brook, Tapley Brook and Strongwater Brook are subject to seasonal, periodic, or continuing flooding. The boundaries of the district are specifically described as all lands below the elevations shown on the following table, and in addition, any area within thirty (30) feet, measured horizontally, of the following waterways:

Location	Elevation
Norris Brook	
Ipswich River to Russell Street . . .	50.0
Russell Street to Lowell Street . . .	53.5
Lowell Street to Mill Pond Dam . . .	54.0
Mill Pond	58.5
Elginwood Pond	59.0
Crystal Lake	59.5
Upstream of Elginwood Pond from Crystal Drive to Pine Street	61.0

Upstream of Pine Street	63.0
Devil's Dishful Pond	88.5
Winona Reservoir	105.0
Suntaug Lake	121.5

12.Use of land within a wetlands conservancy district is limited as following in subparagraphs (b) and (c) of section 4.3.4:

b. Except as provided in paragraph "C" below, the following shall be prohibited within the wetlands conservancy district:

(1) New buildings or structures;

(2) Filling, dumping, excavation, removal or transfer of any earth material which will restrict or increase flood water flow or reduce the flood water storage capacity;

(3) Dumping of trash, rubbish or other waste materials;

(4) Storage of any material or equipment which is toxic or floatable.

c. Subject to the approval of the conservation commission, the following uses shall be permitted in a wetland conservancy district:

(1) Land used for conservation of water, plants, and wild life;

(2) Recreation, including play areas, wild life preserves, golf, boating, fishing and hunting where otherwise legally permitted;

(3) Grazing, farming, forestry and nurseries;

(4) Proper operation and maintenance of dams and other water control structures,

including temporary alteration of the water level for emergency purposes;

(5) Any building existing may be repaired, rebuilt, modified or floodproofed in a manner which would not increase ground coverage. (Ord. of 10-23-80, §1)

The Peabody City Council in rejecting the plaintiff and his former partner, Charles Goutzis' request for reduction of about two feet in the minimum elevation at Devil's Dishful Pond elected to preserve a margin of safety. This seems to be a peculiarly political decision properly to be made by the legislative body and not the courts.

It is well settled that "Every presumption is to be made in favor of the [ordinance], and its enforcement will not be refused unless it is shown beyond reasonable doubt that it conflicts with the Constitution or the enabling statute. (citations omitted) Where the reasonableness of a zoning by-law is fairly debatable, then the judgment of the local legislative body upon which rested the

duty and responsibility for its enactment must be sustained (citations omitted). "Caires v. Building Commissioner of Hingham, 323 Mass. 589 at pages 594-595. Accord: Crall v. Leominster, 362 Mass. 95 (1972) where nearly twenty years ago Justice Quirico lamented the proliferation of cases attacking municipal by-laws or ordinances.

The plaintiffs then contend that if the provisions of the ordinance are valid, their land has been taken without just compensation. It is not every reduction in value from governmental regulation that constitutes a taking. In Caires at page 594 Justice Ronan stated that a zoning regulation "is good even though it may result in hardship to some landowner by depriving him of some beneficial use of his land or may adversely affect the value of some other properties in the vicinity of a newly created

zone. "The regulation of construction in flood plain or wetlands conservancy districts has posed a difficult problem for the Supreme Judicial Court. The issues were discussed at length in Turnpike Realty Co. v. Dedham, 362 Mass. 221, 235 (1972) and it was concluded that while, as here, the plaintiff was substantially restricted in the use of its land, this had to be weighed against the public interest and the potential harm from overdevelopment of a sensitive area. It was concluded that the imposition of limitations on land within the flood plain zone was a valid exercise of the police power and not an invalid taking. The reasons given by the Court are equally applicable here: the protection not only of those who might choose to develop or occupy the land in spite of dangers to themselves and their property, but also others in the community.

On all the evidence therefore I find and rule that the determination of 88.5 as the minimum permitted elevation in the wetlands conservancy district at Devil's Dishful Pond was a valid exercise of legislative discretion, was not arbitrary or unreasonable and is enforceable as applied to land of the plaintiff. I further find and rule that there has been no taking of the plaintiff's land for which he is entitled to compensation.

Judgment accordingly.

Marilyn M. Sullivan
Justice

Dated: January 29, 1991

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

Essex, ss.

Miscellaneous
Case No. 139663

AMERICO LOPES, AS HE IS
TRUSTEE OF THE 841 LAKE
REALTY TRUST,
Plaintiff

v.

JUDGMENT

CITY OF PEABODY,
Defendant

This cause came on to be heard and was argued by counsel and thereupon, upon consideration thereof, it is

ADJUDGED and ORDERED that the determination of 88.5 as the minimum permitted elevation in the wetlands conservancy district as Devil's Dishful Pond was a valid exercise of legislative discretion, was not arbitrary or unreasonable and is enforceable as applied to land of the

plaintiff; and it is also

ADJUDGED and ORDERED that there has been no taking of the plaintiff's land for which he is entitled to compensation.

By the Court (Sullivan, J.)

Attest:

Charles W. Trombly, Jr.
Recorder

Dated: January 29, 1991

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

Essex, ss.

Miscellaneous
Case No. 139663

AMERICO LOPES, AS HE IS
TRUSTEE OF THE 841 LAKE
REALTY TRUST,
Plaintiff

v.

CITY OF PEABODY,
Defendant

ORDER DENYING PLAINTIFF'S MOTION
TO AMEND DECISION AND JUDGMENT

This cause came on to be heard on February 8, 1991 on the plaintiff's motion to amend the decision and judgment and was argued by counsel and thereupon, upon consideration thereof, it is

ADJUDGED and ORDERED that the motion be denied; and it is also

ADJUDGED and ORDERED that the stipulation

referred to in the motion reads as follows:

Now come the parties and stipulate that the Court may find the following facts:

1. The Plaintiff owns the real estate described in a deed recorded at the Essex South District Registry of Deeds, Book 6853, Page 633, which abuts Devil's Dishfull Pond, that he purchased on August 20, 1981.

2. In 1975, the Defendant revised its Zoning Ordinance and Zoning Map, which affected the real estate owned by the Plaintiff by not allowing any use of land in the area of Devil's Dishfull Pond, which has an elevation less than 88.5 feet. The pertinent portions of the Zoning Ordinance and Zoning Map are attached hereto and expressly made a part hereof.

3. Portions of the Plaintiff's land have an elevation below 88.5 feet.

4. The Plaintiff is unable to use his land as a result of the revision of the Zoning Ordinance; the land is zoned for a single residential dwelling;

and it is also

ADJUDGED and ORDERED that the question as to the plaintiff's use of his land is a mixed question of law and fact to be decided by the Court as it was in its decision dated January 29, 1991.

By the Court (Sullivan, J.)

Attest:

Charles W. Trombly, Jr.
Recorder

Dated: February 12, 1991

App. 27

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

91-P-455

AMERICO LOPES, TRUSTEE[1]

v.

CITY OF PEABODY,

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

I. Background

A judge of the Land Court rejected the plaintiff's claim for a determination that § 4.34 of the Peabody zoning ordinance as it applied to his property deprived him of due process of law and constituted a regulatory taking.[2]considered dispositive of the case.

1. Of the 841 Lake Realty Trust

2. The revised zoning ordinance of the City of Peabody (1978) created a Flood Boundary District and Wetlands Conservancy District, s. 4.3.4, and provides in pertinent part, as follows:

"The wetlands conservancy district is hereby

We conclude that the plaintiff's challenge is wanting and affirm the judgment.

The underlying facts are not in dispute. The plaintiff acquired the land in question (one of five parcels) on August 19, 1981. It consisted of about 11,820 square feet on Lake Street in the City of Peabody. Portions of the property abut a body of water known as Devil's Dishful Pond, part of a wetlands conservancy district. See note 2, supra. The locus is zoned for single-family residential use (RS-1), and the plaintiff proposed to construct a single-family dwelling house for sale. His application for

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established as an overlay district, which is separate from the flood boundary district . . . . These lands, adjacent to the city's important waterways, . . . are subject to seasonal, periodic, or continuing flooding. The boundaries of the district are specifically described as all lands below the elevations shown on the following table, and in addition, any area within thirty (30) feet, measured horizontally, of the following waterways. . . ."
Among the listed waterways was Devil's Dishful Pond, which had a listed elevation of 88.5 feet.

a building permit was denied in 1986 because his plan showed that the proposed home was to be constructed within thirty feet of a wetland (Tr. 105-107) and violated the elevation requirements of the ordinance. A. 3[3] Rebuffed by the building inspector, the plaintiff next sought an amendment to the zoning ordinance from the Peabody City Council. He requested that the minimum elevation requirement for his property be reduced to 86 feet. His efforts were to no avail. A. 3.

As noted by the judge in her findings, the city council amended its zoning by-law and created a flood boundary district and wetlands conservancy which encompassed the

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3. Portions of the plaintiff's site plan showed elevations below the 88.5 feet minimum of the ordinance. The entire lot had elevations ranging from 86 feet to 89 feet. The judge found that, although the site plan did not show a thirty-foot setback from the pond, the layout of any proposed house could be revised to meet this requirement. A. 10.

plaintiff's property. A. 8, 12. As a result, those portions of the parcel which fell below the required elevations were rendered unbuildable. The judge found that the minimum levels were set to preserve a margin of safety from flood damage. A. 13. She heard extensive expert testimony from both parties.

She found that the methodology employed by the city in 1975 to fix minimum permissible elevations, an approach based on a hypothetical event occurring every 100 years, was reasonable. Measuring the magnitude of the storm against certain control points and taking into consideration natural constraints to the passage of water and culvert capacity, numerical height predictors were postulated as to when flood water would start running down without inundating residences. A. 9-10. The judge found that the minimum permitted

elevation in the district which encompassed the plaintiff's property was a valid exercise of legislative discretion and that there was no inverse condemnation (taking) of the plaintiff's land for which he was entitled to compensation.

II. Discussion

1. Due process claim. While the limitations imposed on the plaintiff's land by the ordinance mean that he has no practical or beneficial use of his land, A. 23, that alone does not entitle him to a judgment in his favor. In order to survive a due process challenge, the purpose of the by-law "must be rationally related to the promotion of the public safety . . . [and] the means chosen to effectuate the legislative purpose must be reasonable." Consolidated Cigar Corp. v. Department of Pub. Health, 372 Mass. 844, 851 (1977). See

also Shell Oil Co. v. Revere, 383 Mass. 682, 686 (1981). Contrary to the plaintiff's assertions, the city has demonstrated that the regulation is not arbitrary and is rationally related to the purpose of preventing flood damage to homes in the flood district consistent with its stated conservation purposes. A. 24. The fact that the plaintiffs claim that the elevation level is not drawn with scientific precision or that a variation of a foot or two would not jeopardize the total scheme is not fatal. Shell Oil Co. v. Revere, supra, at 687. The city was not compelled to preserve every parcel in the district as a buildable lot when it chose to regulate for public safety and conservation. Ibid. "The general necessity of flood plain zoning to reduce damage to life and property caused by flooding is unquestionable." Turnpike Realty

Co. v. Dedham, 362 Mass. at 233 (citing cases). "Every presumption is to be afforded in favor of the validity of . . . [a by-law] and if its reasonableness is fairly debatable the judgment of the local authorities who gave it its being will prevail." Schertzer v. Somerville, 345 Mass. 747, 751 (1963), and cases cited.

Since the city offered ample evidence in support of its regulation, and the plaintiff's expert offered some testimony that the maximum anticipated flood elevation was set too high (A. 9), at best the question might be debatable. The plaintiff has not sustained his burden by merely questioning the efficacy of standards set under the by-law. "Although persons challenging the constitutionality of . . . [the regulation]

may introduce evidence in support of their claim that the [classification] is irrational, they will not prevail if 'the question [of the classification's rationality] is at least debatable' in view of the evidence" before the judge. Shell Oil Co. v. Revere, 383 Mass. at 688 (citation omitted). See Zayre Corp. v. Attorney Gen., 372 Mass. 423, 432-433 (1977).

The judge was correct when she noted that a zoning regulation "is good even though it may result in hardship to some landowner by depriving him of some beneficial use of his land." The plaintiff claims the use of his land is totally precluded akin to the situation in Caires v. Building Commr. of Hingham, 323 Mass. 589 (1949). The opinion there refers to a locus that had been used for many years as a railroad yard, "which was

entirely different from that of any other land in the vicinity." Id. at 596. In Caires, a by-law restricting the landowner to a residential use many years after the owner had conducted a permitted commercial use bore no reasonable relationship to any zoning purpose and was held invalid.[4] Surely such is not the case here. The plaintiff purchased his property with full knowledge of its location within the regulated flood plain district.

2. The taking issue. Closely related to his due process argument is the plaintiff's contention that, even if the ordinance is valid, his land has been taken without just compensation. In a regulatory taking claim, the property owner must establish that the regulation has in

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4. Nor did the by-law here conflict, as it did in Caires, with the enabling statute. Id. at 594.

substance "taken" his property -- that is, that the regulation goes too far. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).[5] The trend of our cases is in the direction of upholding reasonable restraints on the use of land for environmental reasons. See S. Kemble Fischer Realty Trust v. Board of Appeals of Concord, 9 Mass.App.Ct. 477 (1980) (upholding the denial of a special permit to fill in a flood zone plain); Turner v. Walpole, 10 Mass.App.Ct. 515 (1980) (sustaining a flood plain zone overlay district); Englander v. Department of Envtl. Mgmt., 16 Mass.App.Ct. 943 (1983) (sustaining

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5. The Massachusetts provision for reasonable compensation and the Federal mandate of just compensation are substantially similar. See Sweet v. Rechel, 159 U.S. 380 (1895). Inverse condemnation means that a landowner is entitled to compensation when there is in effect a taking but no legal proceeding instituted by a public authority. United States v. Clark, 445 U.S. 253 (1980).

the commissioner's order prohibiting filling, draining, or dredging of about twelve acres of a wetland in a twenty-four acre parcel).

In Pennsylvania Coal Co. v. Mahon, 260 U.S. at 417 (1922), Brandeis, J. dissenting, states, "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking"; and he went further: "Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put." Id. at 418. A landowner, like the plaintiff, who purchased a parcel which he knew was regulated by the Wetlands Protection Act (G. L. c. 131, §§ 40) can hardly claim inverse condemnation because the municipality has prohibited or limited development of the parcel. See McNeil v. Avon, 386 Mass. 339 (1982), holding a frontage requirement as

applied to a particular parcel not an unconstitutional taking because it prevented the land from being put to its most profitable use.

Judgment affirmed.

By the Court (Dreben, Porado, & Greenberg, JJ.),

Nancy Turck Foley
Clerk

Entered: July 7, 1992.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT FOR THE COMMONWEALTH

At Boston, July 7, 1992

In the case of

AMERICO LOPES, TRUSTEE

v.

CITY OF PEABODY,

pending in the Land

Court for the County of Suffolk

Ordered, that the following entry be made in the docket; viz.,-

Judgment affirmed.

By the Court,

Nancy Turck Foley,
Clerk

July 7, 1992

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412 Courthouse, Boston, Massachusetts 02108
(617) 725-8055

Nicholas J. Decoulos, Esquire
Decoulos & Decoulos
248 Andover Street
Peabody, MA 01960

RE: Docket No. FAR-06240

AMERICO LOPES, Trustee

vs.

CITY OF PEABODY

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on September 3, 1992, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: September 4, 1992

To: Nicholas J. Decoulos, Esquire
Lawrence J. O'Keefe, Esquire

General Laws of Massachusetts

Chapter 185, Section 1.

"The land court department shall have the exclusive original jurisdiction of the following matters: . . .

(j1/2) Complaints under section fourteen A of chapter two hundred and forty to determine the validity and extent of municipal zoning ordinances, by-laws and regulations."

Chapter 240, Section 14A.

"The owner of a freehold estate in possession in land may bring a petition in the land court against a city or town wherein such land is situated, which shall not be open to objection on the ground that a mere judgment, order or decree is sought, for determination as to the validity of a municipal ordinance, by-law or regulation, passed or adopted under the provisions of chapter forty A or under

any special law relating to zoning, so called, which purports to restrict or limit the present or future use, enjoyment, improvement or development of such land, or any part thereof, or of present or future structures thereon, including alterations or repairs, or for determination of the extent to which any such municipal ordinance, by-law or regulation affects a proposed use, enjoyment, improvement or development of such land by the erection, alteration or repair of structures thereon or otherwise as set forth in such petition. The right to file and prosecute such a petition shall not be affected by the fact that no permit or license to erect structures or to alter, improve or repair existing structures on such land has been applied for, nor by the fact that no architects' plans or drawings for such erection, alteration, improvement or

repair have been prepared. The court may make binding determinations of right interpreting such ordinances, by-laws or regulations whether any consequential judgment or relief is or could be claimed or not." (1934, 263, § 2; 1975, 808 § 5.

Supreme Court, U.S.
FILED
FEB 19 1993
OFFICE OF THE CLERK

(2)

No. 92-933

In The

Supreme Court of the United States

October Term, 1992

AMERICO LOPES, TRUSTEE OF THE 841 LAKE REALTY TRUST,

Petitioner,

vs.

CITY OF PEABODY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

LAWRENCE J. O'KEEFE
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9 pp

QUESTIONS PRESENTED

1. Does a landowner have standing to seek compensation under the Fifth Amendment of the Constitution when a portion of his property is subject to a valid exercise of a municipality's police power to preserve a margin of safety from flood damage?

2. Does a landowner have standing to seek compensation for an alleged "inverse condemnation" of a portion of his property subjected to a valid regulation, when at the time said landowner acquired ownership of the subject property, the regulation had been in effect for more than five years and the landowner knew or should have known of its existence?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Constitutional Provisions, Treaties, Statutes and Ordinances Involved 1

Statement of the Case 2

Reasons for Denying the Writ 3

I. A zoning regulation which is a valid exercise of a municipality's police powers enacted for purposes of public safety, namely prevention of flood damage to homes, is not a "taking" even though it may render some properties minimally usable or unusable.

On the question of reasonableness, if it is fairly debatable, every presumption is to be afforded in favor of the judgment of the local authorities who gave it its being. 3

II. To have standing to claim compensation for an inverse condemnation "taking" it is necessary that the claimant have a property interest in the property allegedly taken. 4

Conclusion 5

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Goldblatt v. Hempstead, 369 U.S. 590, 8 L. Ed. 2d 30 (1962) 3, 4

MacNeil v. Avon, 386 Mass. 339 (1982) 5

Nollan v. California Coastal Comm., 483 U.S. 825 (1987) 4

Turnpike Realty Co. v. Dedham, 362 Mass. 221 (1972) .. 4

Statute Cited:

The General Laws of Massachusetts:

Chapter 185, Section 1 (j 1/2) 1

Chapter 240, Section 14A 1

United States Constitution Cited:

Fifth Amendment ..... i, 2

Fourteenth Amendment 2, 3

No. 92-933

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Supreme Court of the United States

October Term, 1992

AMERICO LOPES, TRUSTEE OF THE 841 LAKE REALTYTRUST,

Petitioner,

vs.

CITY OF PEABODY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND ORDINANCES INVOLVED

The General Laws of Massachusetts, Chapter 185, Section 1 (j 1/2) and Chapter 240, Section 14A (A41-42), provides a means of relieving a particular lot, or parcel of land, from specific provisions of a Zoning Ordinance, as it applies to the Zoning District within which the lot or parcel lies. It does not provide for compensation as sought by the Petitioner.

STATEMENT OF THE CASE

In August 1981, the Petitioner bought land located on Lake Street, Peabody, Massachusetts — portions of the land were separated by a railroad, right of way, other portions of the land were separated by a pond of water known as "Devil's Dishful."

At the time the Petitioner purchased the subject land, there was in existence a Zoning Ordinance for the City of Peabody which had been enacted in 1975, and which had a "flood boundary district" and "wetlands conservancy district," (A15-18), regulating the use of properties within said district below certain stated minimum elevations above mean sea level.

The Petitioner knew or should have known of this regulation at the time of his purchase of the subject property in 1981. The Petitioner has sold as single family house lots portions of what he had originally purchased on Lake Street in 1981, and houses have been built on these sold lots.

After failing to have the Peabody City Council amend the Zoning Ordinance in 1986, the Petitioner commenced an action in the Massachusetts Land Court to seek relief from the "wetlands conservancy," and the "flood boundary district" regulations with respect to this one parcel of land. There may also be other zoning restrictions that could adversely affect this parcel which were noted in the Land Court case but were not addressed (A14-15).

The Land Court (A9-26), and the Appeals Court (A27-39) and the Supreme Judicial Court of the Massachusetts (A40) have all rejected the Petitioner's arguments, and have in fact found that the regulations contained in the Peabody Zoning Ordinance were not a "taking" under the Fifth and Fourteenth Amendments of the Constitution and were in fact a reasonable exercise of the City's

police power to maintain public safety from flood damage (A20-21).[1]

REASONS FOR DENYING THE WRIT

I.

A ZONING REGULATION WHICH IS A VALID EXERCISE OF A MUNICIPALITY'S POLICE POWERS ENACTED FOR PURPOSES OF PUBLIC SAFETY, NAMELY PREVENTION OF FLOOD DAMAGE TO HOMES, IS NOT A "TAKING" EVEN THOUGH IT MAY RENDER SOME PROPERTIES MINIMALLY USABLE OR UNUSABLE.

ON THE QUESTION OF REASONABLENESS, IF IT IS FAIRLY DEBATABLE, EVERY PRESUMPTION IS TO BE AFFORDED IN FAVOR OF THE JUDGMENT OF THE LOCAL AUTHORITIES WHO GAVE IT ITS BEING.

The reduction or elimination of the beneficial uses of property, imposed by a Zoning Ordinance, by itself, does not entitle someone to a due process judgment under the Fifth and Fourteenth Amendments. It must be shown that the purpose of the law is not rationally related to the reasonable promotion of public safety.

In *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 30 (1962), a town ordinance which prohibited excavation below 2 feet above maximum groundwater level was held not to cause a "taking" of property which constitutionally required compensation. In that case the ordinance was found to be a valid

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1. There was absolutely no evidence at the time of trial concerning the taking, as such, *i.e.*, value, ownership, prior compensation, statute of limitations, etc.

exercise of the town's police powers and the mere fact that it deprived the property of its most beneficial use did not render it unconstitutional. It was further found that the owners had failed to carry their burden of showing that the ordinance was an unreasonable exercise of its police power.

Both the Land Court and the Appeals Court of Massachusetts have made the same findings as the *Goldblatt* case, *supra* (A18-21 and A33-35), with respect to the reasonableness of the City of Peabody's Zoning Ordinance finding that it was a valid exercise of its police power to prevent damage to property by flooding. *See also, Turnpike Realty Co. v. Dedham,* 362 Mass. 221, 233-235 (1972), where the public interest, outweighed the landowner's loss by restriction in use of his land, and was not a taking.

II.

TO HAVE STANDING TO CLAIM COMPENSATION FOR AN INVERSE CONDEMNATION "TAKING" IT IS NECESSARY THAT THE CLAIMANT HAVE A PROPERTY INTEREST IN THE PROPERTY ALLEGEDLY TAKEN.

In the cases decided by the United States Supreme Court, involving takings, the party seeking compensation has been an owner of property, or someone with a property interest of some sort, at the time of the so-called "taking."

The Petitioner in making his argument against this point of view cites *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987), suggesting that you do not have to own, or have a property interest in land to sustain an action for a taking. You can acquire the land after the so-called "taking" and have a right of action.

These are not the facts of the *Nollan* case, *supra.* In that case

the Nollans had an option to purchase certain property and a condition of the purchase was the removal of a structure which came under the jurisdiction of the California Coastal Commission. The regulations that were appealed from by the Nollans were imposed directly on them after they applied for their permit. Further, the restriction, in the form of an easement, was unique to their property.

The instant case involves a general zoning regulation that applied to a complete district and had been in effect five years when the Petitioner bought his property. Therefore, he knew or should have known at the time of purchase that there was a restriction. *See MacNeil v. Avon*, 386 Mass. 339 (1982). Petitioner would not be entitled to compensation for a taking, even if the Zoning Ordinance did not qualify as one "in the public interest," because he had no right, title or interest in the property at the time the Zoning Ordinance was enacted.

CONCLUSION

The Petitioner's Writ of Certiorari should be denied based on the decisions of the Land Court, the Appeals Court and the Supreme Judicial Court of Massachusetts, with all of the reasons stated therein, as well as the reasons submitted herewith.

Respectfully submitted,

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